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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 194

ROUL MATEUS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

MORRIS LAVINE,
Counsel for Petitioner.

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BRIEF IN REPLY TO GOVERNMENT'S OPPOSITION TO CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices thereof:

The wily Jap has succeeded again. Yamatoda, the gambler, was being put away by his rivals, who sought to have him tried and convicted of narcotic violations, murder, etc., and did succeed in having him convicted in the state court of California of murder.

But Yamatoda was not to be outlawed by the law. This he reserved for his rivals. He evaded the state's murder "rap" by a reversal. (See *People* v. *Kinowaki et al.*, 39 Cal. App. (2) 376). Then he called into play the Lindbergh Kid-

naping Law on his Japanese adversaries. This was after he had consulted private counsel. His former story of walking into Mexico was changed to "Kidnaping," and Yamatoda's legal jiu jitsu caused his rivals to "fall." The principal "hold" was the Lindbergh Kidnaping Law.

By his conviction, Mateus is the only non-Japanese and non-rival found guilty of violation of this statute.

It is respectfully submitted that the Lindbergh statute was never meant, or intended by Congress, to have the use to which Yamatoda put it in this case. To Mateus, whom it was necessary to throw in this manner, Yamatoda is probably saying, "So sorry. Excuse it please." His objective was his Japanese rivals.

The Government's brief in opposition does not answer the contention of congressional intent as applied in this case. A hearing on certiorari is necessary to define the purposes of the act as intended by Congress and to prevent misuses of the act (under such a faulty interpretation) by one gambler to outlaw rivals and imprison them, and take an American with them.

The history of the statute is well known. The Lindbergh baby was taken and held for *ransom and reward.*

Here, the Government concedes that *Mateus* at no time made any demand for *ransom or reward,* but it now advances the bizarre suggestion that the petitioner took $2500 from Yamatoda at the point of a gun. In the next breath it does not consider this the purpose and says: "And since petitioner undoubtedly expected to gain favor with his chief (Oswalt) by helping his friends dispose of their rival and by helping him to gain the revenge he desired, it is clear the petitioner's motives came within the condemnation of the statute, even if he had not reaped a $2,500 reward."

The test is its purpose at the time of the alleged taking or kidnaping.

It was never the Government's theory in the trial that Yamatoda was kidnaped for $2,500, or that Mateus joined in a kidnaping to gain favor with his boss, Chief of Police Oswalt. This is advanced for the first time in this court, and was not even urged in the Circuit Court. This petition is from the errors in the trial court upon the theory upon which the Government tried its case there. It was there urged that the whole purpose and motive of the alleged kidnaping was to put Yamatoda out of the way so his rivals could run his gambling business.

THE STATUTE SAYS: "WHOEVER SHALL *KNOWINGLY* TRANSPORT * * * AND HOLD FOR RANSOM OR REWARD * * *"

The transporting must be *knowingly* for the *purpose of ransom and reward.* It is conceded no such purpose was shown. Seeking favor with one's boss, the Chief of Police, who is not being transported, is not the ransom or reward as contemplated by the statute.

The Government further says: "Finally, we submit that it is a reasonable inference from all the evidence that petitioner could not have been unaware of the reasons why his co-defendant wanted to remove Yamatoda."

Thus the statute requires that *guilty knowledge* be specifically proved as an element of the crime, and that the guilty knowledge must include the guilty knowledge of the *ransom and reward,* and it cannot be left to surmise, conjecture or "reasonable inference" where the evidence fails to establish this positively and beyond a reasonable doubt. And, necessarily, under the record as here exists, which inference could not be gained under any circumstances unless the jury took into consideration matters relating to the conspiracy charge of which petitioner was not convicted, and therefore such testimony was inapplicable and improper as to this petitioner,

Under its heading "Argument", the Government presents: "1. The evidence fully warranted the jury in finding that Yamatoda was put out of the car in Mexico." (Government's Brief, p. 10.)

To support this finding the Government advances the following: (a) "Yamatoda was told that he was being taken to Mexico." (p. 10) This, of course, is rank hearsay and establishes nothing.

(b) "When he was put out of the car defendant Sonoda said, 'This is Mexico.'" (p. 11) This is more of the same character of hearsay and does not establish that the place was Mexico.

(c) "Exhibit 48 was identified as a picture of the place in Mexicali where they left him." (p. 11) Regarding Exhibit 48 the witness said: "Exhibit 48 is Mexico." This was Yamatoda's conclusion. No one else identified it as Mexico. He continued: "I was at this place about two o'clock in the morning of December 24, 1938. Sonoda, Mateus and Keating were with me at that time. This is the place I alighted from the yellow coupe indicated by a red 'X' on the exhibit. After Mr. Sonoda put the money in my pocket he said, 'That is the power house. Nobody is there,' and he ran toward the direction which I thought was west. I did not see Mateus or Keating at that time but I did not follow Sonoda. I did not see any other people in the street. I ran to a house on the other side of the street where there was a light. I knocked at the second of two doors to the house. A woman yelled in a loud voice that I thought was Spanish. After I talked to this lady in the house I crossed the street and walked toward a lighted house" (R. 332, 333).

> "The Court: Now, just a moment. Is it the contention of the Government that any of the defendants were present after the running westward of Mr. Sonoda?

"Mr. Shire: No, your Honor, these are merely connecting up circumstances."

There is no evidence in the record that Exhibit 48 was Mexico.

The Government further says: "* * * shortly after the kidnaping a United States Customs Inspector saw petitioner and Keating driving from Mexico into the United States at the Mexicali-Calexico border line in a car which fitted Yamatoda's description of the one in which he had been abducted." (p. 11)

Keating, of course, was never accused. He denied he had taken Yamatoda into Mexico (R. 582).

The return of this automobile from Mexico by Keating and Mateus was no proof that Mateus had taken Yamatoda into Mexico. The same customs inspector who claims to have seen these two men come into the United States did not testify to seeing them go into Mexico with Yamatoda, and it is a fact of which this Court may take judicial knowledge that cars crossing the border, going either way, are examined by customs inspectors on both sides of the line.

The Government says: "In view of this evidence, it is immaterial if, as petitioner asserts, Yamatoda did not know of his own knowledge at the time, whether he was across the border when he was put out of the car" (p. 11).

But it is material for this case for the Government to prove where Yamatoda was put out of the car, and whether he was put out of the car in the United States or in Mexico. This essential element of the charge must be proved by substantial evidence. Somebody must know whether Yamatoda was transported across the border, and his statements against his rivals which he thought up several days later, after he had told the immigration officers he had walked across the border alone, cannot be classed as substantial evidence.

In its argument the Government asserts in a footnote that petitioner's contention that Yamatoda's testimony is unworthy of belief because of his disreputable character and because his story is inherently improbable is answered by the case of *Glasser* v. *United States*, 86 L. Ed. 405, 416, which asserts that the witness's credibility was for the jury to determine. The Glasser case is easily distinguishable, because there the testimony against the defendant was "*largely that of accomplices and unsavory characters.*" There were others who were not accomplices or unsavory characters.

In this case the only testimony regarding the alleged kidnaping for ransom and reward in foreign commerce was that of Yamatoda, who, under oath, had given a contradictory statement to the Mexican Immigration officials. In one case or the other he had disregarded the truth and was willing to make a statement which he claimed would be beneficial to him in getting back to the United States, and it becomes a question of law as to whether the whole of the testimony should not thereafter be disregarded.

(*Speiller* v. *United States*, 31 F. (2d) 682; *Sykes* v. *United States*, 204 Fed. 909, 913.)

In the Sykes case it is held:

> "'It is undoubtedly the better practice,' says the Supreme Court, 'for courts to caution juries against too much reliance upon testimony of accomplices, and to require corroborating testimony before giving credence to them.' Holmgren v. United States, 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Am. Cas. 778.) And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the

perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substanial evidence of it. Jahnke v. State, 68 Neb. 154, 104 N. W. 154, 158."

The Government seems to inferentially recognize this rule by pointing to testimony that it says corroborates Yamatoda's fantastic and unbelievable story. But an examination of each of these references pointed out by the Government, just as in the Sykes case, shows them to relate to certain facts regarding Yamatoda's arrest and the proceedings, all of which Yamatoda knew that other persons knew and could corroborate. None of the alleged corroboration goes to the kidnaping for the *purpose of ransom* or reward or otherwise, and none shows that Yamatoda was transported in foreign commerce.

The Government's references are also to matters before, admittedly, Mateus entered into the case at all. There is no corroboration that Mateus held open the car door in front of the police station and pushed Yamatoda in; there is no corroboration that Yamatoda grabbed the wheel or that petitioner pulled him by the neck; there is no corroboration that petitioner was on a trip to Mexico in the car with Yamatoda; there is no corroboration that petitioner ordered Yamatoda out, took his money or told him to move on or be shot. Evidence that Mateus was in Mexico after Yamatoda claimed he was abandoned in Mexacali is not corroboration of any of the facts or circumstances claimed by Yamatoda.

The Government blows hot and cold,—first saying that the petitioner benefited financially to the extent of $2,500, a claim which was not advanced by the Government at the trial of the case as the purpose and object of any kidnaping,—then it abandons that claim and asserts that petitioner was trying to gain favor with his chief, Oswalt, by

helping his friends dispose of their rival "even if he had not reaped a $2500 reward."

While consistency is not necessary in any verdict, still, where a jury cannot agree that a person is guilty of conspiracy to commit an offense, their finding that he committed the offense—which necessarily requires proof that there was a conspiracy—is blowing hot and cold, and, as stated in *Speiller* v. *United States,* 31 F. (2d) 682, "When the liberty of a citizen is at stake a jury will not be permitted to make a plaything of a verdict and blow hot and cold at the same time."

Yamatoda's testimony is very much like the story of Mrs. Callahan in the case of *Sykes* v. *United States,* 204 Fed. 909, wherein her testimony was contradictory, and contradicted under oath by herself,—inspired by the hope of immunity from punishment.

In the case at bar Yamatoda's testimony was contradictory, evasive and uncertain. He contradicted his own declaration to the immigration officers in Mexico. His testimony was inspired, not by the hope of immunity from punishment, but by the hope of vicious Japanese vengence which he sought to inflict upon his Japanese rivals, which in this case, "has since turned to glad fruition." Such testimony is not only insufficient to establish the guilt of the petitioner beyond a reasonable doubt, but it presents no substantial evidence as to his guilt. (*Sykes* v. *United States,* 204 Fed. 909, 913; *Jahnke* v. *State,* 68 Neb. 154, 104 N. W. 154, 158.)

II.

Appellee says that petitioner contends that his conviction on the substantive count is inconsistent with the jury's failure to agree as to his guilt on the conspiracy count because under the facts it would have been impossible for Mateus to have committed the substantive offense unless he

had conspired with the others to commit it. (Appellee's Br. pp. 13, 14.) Appellee says this contention was not raised in the court below. However, it was impossible for petitioner to have raised this question in the court below since he was tried on an indictment which charged him with both conspiracy and a substantive offense.

Originally, and at common law, every offense charged had to be by separate indictment. By statute it is now proper to charge both the conspiracy and the substantive offenses in a single indictment. But where, as here, the same jury heard the evidence in both the conspiracy and the substantive offenses, it was bound to be prejudiced against petitioner on the substantive offense by reason of matters brought out under the conspiracy charge, which it could not obliterate from its mind after once having heard the testimony. Guilty knowledge on the part of the petitioner could exist only if he had knowledge of the conspiracy and the events which took place prior to his being brought into the case.

Absence of connection with or knowledge of the events which preceded the morning of December 24th, when Yamatoda says he was transported into Mexico, is inconsistent with any acts of "kidnaping for ransom or reward," and precludes the inference or thought that petitioner was one of the conspirators. The fact that it is only those events which took place in Los Angeles long before petitioner was ever known or heard of in the picture on which any possible claim of kidnaping for ransom or reward was sought by the Government, and the failure to find the petitioner guilty of conspiracy are both inconsistent with any finding of guilt on the substantive offense.

Also, one who is not a conspirator is not an aider and abettor. (*United States* v. *Falcone*, 109 F. (2d) 579, 85 L. Ed. 128.)

Appellee also says that the disagreement of the jury as to the guilt of Oswalt, the Chief of Police, was inconsistent and void as to the petitioner. The record shows that petitioner, if he was acting at all, was acting under the jurisdiction of his superior, the Chief of Police, and the presumption of law is that official duty was regularly performed, if the petitioner was acting.

III

Appellee implicitly concedes that the petitioner was prejudiced when it argues that because a prima facie showing of petitioner's participation in the conspiracy was made it was therefore proper to admit testimony regarding the acts and declarations of co-conspirators.

Appellee then argues, in accordance with the Circuit Court's decision, that "the adoption of petitioner's contention would require a trial judge in each instance to foresee just what decision the jury will reach as to each alleged co-conspirator" * * * and "would practically abrogate the rule of responsibility of all members of a conspiracy for acts of the other conspirators." (Appellee's Br., p. 15.)

This is but another way of saying that although the petitioner was not convicted of conspiracy it was proper to admit all this mass of evidence regarding the conspiracy into the case against petitioner, and to permit the jury to consider it in finding him guilty of the substantive offense. The prejudicial weight of such a mass of irrelevant, incompetent, prejudicial and shotgun immaterial testimony regarding a conspiracy against petitioner, who was not found guilty of the same, was so great that no jury could eliminate it in considering the substantive count. It is an impossible legal proposition for a jury to unscramble eggs and separate the white of conspiracy from the yolk of the substantive offense.

Conclusion.

It is respectifully prayed, therefore, that this Honorable Court grant certiorari to the lone, non-Japanese petitioner, Roul Mateus. The legal propositions presented by this appeal raise important Federal questions of general importance not heretofore decided by this Court, as to the scope, purposes and Congressional intent of the Lindbergh Kidnaping Law, and the question of what constitutes substantial evidence to sustain a conviction in the courts of the United States, and whether, under the facts of this case, the petitioner was so greatly prejudiced by testimony which did not relate to him as to require a reversal of the judgment.

Respectfully submitted,

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